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BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of

Federal-State Joint Board
on Universal Service

)
)
) CC Docket No. 96-45
)
)

**COMMENTS OF THE
CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION**

Michael F. Altschul
Vice President, General Counsel

Randall S. Coleman
Vice President for
Regulatory Policy and Law

**CELLULAR TELECOMMUNICATIONS
INDUSTRY ASSOCIATION**
1250 Connecticut Avenue, N.W.
Suite 200
Washington, D.C. 20036
(202) 785-0081

Its Attorneys

December 19, 1996

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**COMMENTS OF THE
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The Cellular Telecommunications Industry Association,¹ by its attorneys, submits its Comments in the above-captioned proceeding.²

INTRODUCTION AND SUMMARY

The Recommended Decision³ issued by the Joint Board in this proceeding made considerable headway toward establishing a federal universal service support mechanism that meets the requirements established by Congress in Section 254 of the

¹ CTIA is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the association covers all Commercial Mobile Radio Service ("CMRS") providers, including 48 of the 50 largest cellular, broadband personal communications service ("PCS"), enhanced specialized mobile radio, and mobile satellite service providers. CTIA represents more broadband PCS carriers, and more cellular carriers, than any other trade association.

² Federal-State Joint Board on Universal Service, Public Notice, "Common Carrier Bureau Seeks Comment on Universal Service Recommended Decision," in CC Docket No. 96-45, DA 96-1891 (released November 18, 1996).

³ Federal-State Joint Board on Universal Service, Recommended Decision, in CC Docket No. 96-45, FCC 96J-3 (released November 8, 1996) ("Recommended Decision").

Communications Act of 1934, as amended. CTIA applauds the Joint Board's recommendation that the Commission ensure that universal service support funding be available to all eligible carriers on a technology and competitively neutral basis. However, CTIA also believes that the Commission must make a conscious effort to include wireless technologies in its rules and policies by adopting flexible definitions of services, service standards and service areas that do not effectively exclude wireless providers from eligibility, and by requiring that States do so as well.

It is particularly important that the Commission, at a minimum, account for the provision of service by wireless carriers when developing and adopting a proxy cost model to determine the appropriate level of high cost support available in an area. This will avoid subsidizing the provision of service by unnecessarily high-cost carriers and support the efficient provision of supported services. Similarly, the Commission should ensure that wireless carriers and wireless technology are available to schools and libraries by including wireless services in the definition of supported services for schools and libraries.

In addition to the issues related to the incorporation of wireless providers into the Federal universal service rules, CTIA addresses an important jurisdictional matter in these comments. CTIA strongly disagrees with the Joint Board's finding that CMRS providers may be compelled by States to contribute to State-administered universal service funds. On the contrary, the plain meaning of Section 332(c)(3), as confirmed by its legislative

history, prohibits mandatory contribution by CMRS providers to State universal service funds.

I. UNIVERSAL SERVICE ELIGIBILITY RULES MUST ACCOUNT FOR AND INCLUDE NON-WIRELINE TECHNOLOGIES.

The Telecommunications Act of 1996 ("1996 Act") establishes that all telecommunications common carriers should be eligible to receive funding from universal service support mechanisms.⁴ In deciding that incumbent LECs ("ILECs") should no longer be the sole providers or recipients of federally subsidized universal service support, Congress sought to foster the advent of local loop competition. Congress also sought to increase access to supported services and to improve efficiencies in the delivery of supported services. In so doing, Congress recognized that the introduction of competition and new technologies, including wireless services, could eventually reduce the overall cost of providing universal service support.⁵ The Commission should further these Congressional purposes by adopting flexible rules which are inclusive of CMRS providers and which are carefully tailored to minimize the impact of the universal service program on local loop competitive entry.

Indeed, the Commission must be ever mindful that the federal universal service support mechanisms established in this proceeding will provide a substantial source of funding for all eligible carriers. While Congress and the Joint Board have

⁴ See § 47 U.S.C. 214(e)(1)(A), (B) (All common carriers are eligible to receive universal service support if they offer the required services and advertise their availability).

⁵ See S. Rep. No. 104-23, 104th Cong., 1st Sess. 26 (1995).

deemed such subsidies necessary to promote the universal availability of supported services, ineligibility for such subsidies could constitute a significant entry barrier.

Fortunately, many of the provisions of the Recommended Decision seek to achieve the efficient delivery of services by reaffirming that the Commission's rules should be technology and competitively neutral. Consistent with the majority of commenters, the Joint Board concludes that any carrier meeting the criteria of Section 214⁶ should be eligible to receive federal support, "regardless of the technology used by that carrier,"⁷ and the Joint Board recommends that competitive neutrality be explicitly included in the guiding principles of universal service.⁸ To accomplish these goals, the Commission must avoid adopting definitions or policies precluding the participation of specific services or technologies.⁹ Similarly, the Commission should make clear that States are prohibited from

⁶ 47 U.S.C. § 214(e).

⁷ Recommended Decision at ¶ 155.

⁸ Id. at ¶ 23 ("We recommend that the Commission also establish 'competitive neutrality' as an additional principle upon which it shall base policies for the preservation and advancement of universal service. . .").

⁹ See Michele C. Farquhar, Chief of the FCC's Wireless Telecommunications Bureau, Address at the Wireless Practice Committee of the Federal Communications Bar Association (Dec. 5, 1996) ("[T]he universal service rules should not favor incumbent carriers or wireline technologies. The Joint Board endeavored to make sure that all *competitors* using *any technology* to provide the designated services are eligible both to provide universal service and to receive support for providing that service.") (emphasis in original).

adopting requirements that explicitly or effectively favor one form of telecommunications technology over another.

For example, the Recommended Decision states that the Commission should encourage States to adopt service areas that make it more competitive for a new CMRS provider to enter the market by not having to conform its signal or service area to the precise contours of the ILEC's service area. This not only encourages CMRS entry into supported areas, but also recognizes that any unreasonably large service area designation could be a violation of Section 253.¹⁰ Establishing rules that are sufficiently flexible to allow participation by carriers utilizing different technologies is the only method by which the Commission can achieve real, efficient competition in the delivery of services to those areas requiring support.¹¹

Moreover, the Commission should not adopt rules based on definitions or policies precluding the participation of specific services or technologies. For instance, capacity requirements or service quality standards that are defined consistent with

¹⁰ 47 U.S.C. § 253(a) ("No state or local statute or regulation. . . may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."). The Recommended Decision further recommends that the Commission preempt a State service area designation where it is necessary to effectuate efficient universal service support. Recommended Decision at ¶ 178.

¹¹ The Joint Board explicitly determined that the designated services under Section 254(c)(1) must be technology neutral. Where necessary, the Joint Board recommends adopting supported service definitions which include the functionally equivalent service provided by wireless carriers. See Recommended Decision at ¶¶ 45-53.

wireline terminology should be clearly adaptable to comparable wireless standards.¹² The Commission should also be flexible to the technical parameters of wireless carriers during the implementation of its regulations.

II. THE COMMISSION MUST ACCOUNT FOR WIRELESS TECHNOLOGIES WHEN ADOPTING A PROXY MODEL.

The Joint Board recommended that the Commission utilize a cost proxy model to calculate the forward-looking cost of providing service to a specific service area to set the proper level of support a carrier should receive for its service offerings in that area.¹³ Eligible telecommunications carriers providing supported services would receive funding based on the difference between the costs established by the proxy model and a benchmark based on the nationwide average revenue per line.¹⁴

The Joint Board did not endorse any of the proposed proxy models. However, it specified many of the factors that should be considered in adopting a proxy model, and it identified two of the models as the best foundations upon which to build a working proxy model. Unfortunately, the proposed models are based upon wireline technology, which, absent Commission action, could prejudice CMRS providers and result in an artificially inflated

¹² Capacity requirements based on T-1 transmission standards or service quality standards measuring post dial delay are examples of terminology not applicable to wireless carriers. At a minimum, any provisions based on wireline technology must allow for comparable realization by non-wireline carriers.

¹³ See Recommended Decision at ¶ 268. Support for rural areas will not immediately be based on a proxy model, but rather will be phased in over a six year period. See id. at ¶ 283.

¹⁴ Id. at ¶ 309.

high cost subsidy.¹⁵ Ideally, the Commission would approve a model that directly incorporates wireless technologies and thereby accounts for the fact that in certain circumstances non-wireline technologies may be capable of offering supported services at a lower cost than wireline carriers.¹⁶ At a minimum, however, the Commission's final determination in this matter should acknowledge that present wireless technologies and future wireless advances may make non-wireline carriers the least cost service provider in certain circumstances.

Incorporating, or, at a minimum, accounting for wireless technologies when developing a proxy model would be consistent with the principles set forth in the Recommended Decision. Specifically, the Joint Board recommended that the level of support given to any carrier "should be based on the cost of an efficient carrier and should not be used to offset the costs of inefficient provision of service."¹⁷ Distributing funds based on

¹⁵ The BCM2 and the Hatfield models may be sufficient to develop a usable proxy model, but as currently proposed, they are not competitively and technology neutral. Both models are clearly designed to determine the wireline cost of providing service to specific geographic areas. See id. at ¶¶ 246, 250, 262, 279 (The BCM2 model measures distribution cables, feeder cable costs, fill factors, estimates of residential lines and urban cost elements associated with installing wireline facilities. The Hatfield model considers similar elements as well as interoffice transport and subscriber drops).

¹⁶ An efficient expenditure of universal service support funds can only be achieved if the proxy model is both technology neutral and competitively neutral. In other words, the disbursement of funds would be targeted for the least cost service provider and would not be limited to one type of technology or competitor.

¹⁷ Recommended Decision at ¶ 270.

the costs of an inefficient carrier, including a wireline carrier, disserves the public interest because it increases the overall amount required for the universal service support fund, encourages investment in inefficient technology, and confers an arbitrary competitive advantage on carriers using high-cost technology. Similarly, the Joint Board seeks to promote the adoption of a model where the "[t]echnology assumed . . . should be the least-cost, most efficient and reasonable technology for providing the supported services that is currently available for purchase."¹⁸ An inflexible Commission approach to the proxy model, limited to current wireline technology, may result in the calculation of the most efficient wireline means of providing services, but it would not necessarily realize the most efficient means of providing services.¹⁹

III. THE COMMISSION SHOULD GUARANTEE THAT ALL TELECOMMUNICATIONS CARRIERS, REGARDLESS OF THE TECHNOLOGY UTILIZED, ARE ELIGIBLE TO RECEIVE UNIVERSAL SERVICE SUPPORT FOR SERVICES PROVIDED TO SCHOOLS AND LIBRARIES.

Section 254 requires telecommunications carriers to provide their services to schools and libraries at discounted rates.²⁰ Rather than specifying which services could be provided, the

¹⁸ Id. at ¶ 277.

¹⁹ The recently released Commission Public Notice seeking further information on proxy cost models does not appear to take into account the concerns of wireless service providers. The Commission should use the January, 1997, forum to explore what changes in the proxy models would be necessary to account for wireless technologies. See Federal-State Joint Board on Universal Service: Staff to Hold Workshops on Proxy Cost Models on January 14-15, 1997, Public Notice in CC Docket 96-45, DA 96-2091 (released December 12, 1996).

²⁰ 47 U.S.C. §254(h) (1) (B).

Recommended Decision concludes that the Commission should grant schools and libraries flexibility to determine those services they may wish to purchase, while allowing such services to be supported by universal service funds.²¹ Indeed, the Joint Board specifically declined to recommend excluding wireless providers from eligibility for provision of supported services to schools and libraries.²² Emphasizing the importance of efficient, technology neutral rules, the Recommended Decision states that, "[p]ermitting schools and libraries full flexibility . . . eliminates the potential impediment that new technologies will not be available to schools and libraries until the Commission has had the opportunity to conduct a proceeding to review evolving technological needs."²³

Recognizing that in many instances wireless carriers may be able to provide valuable services to schools and libraries at costs below those of wireline carriers, the Commission should not only permit wireless carriers to receive support from universal service funds, but should also preempt any State or local statutes or regulations which exclude, or have the effect of

21 Recommended Decision at ¶ 461 ("This flexibility should encourage schools and libraries to use both the most efficient services and the most efficient technologies, including wireless and other emerging new media. We decline to recommend the suggestion . . . that the Commission discourage the use of wireless [technology] . . . ").

22 Id.

23 Id.

excluding, wireless carriers.²⁴ True flexibility requires that States be restrained from confining the options of schools and libraries in choosing the technology most appropriate for their needs.

One of the most important conclusions reached in the Recommended Decision was to include as a covered service the cost of providing internal connections in schools and libraries.²⁵ As Commissioner Ness notes, "[l]earning occurs in the classroom. . . [t]hat's why the legislation explicitly promotes the connection not just of 'schools,' but of 'classrooms.'"²⁶ The Commission should implement this conclusion by adopting a flexible approach which avoids placing any limitation on the types of eligible internal connections. Specifically, wireless LANs, as well as all other applicable wireless services, must be included in the universal service support programs.²⁷ Inclusion of wireless carriers not only increases competition for these services, but costs may be lowered as "wireless connections would be the more efficient alternative for connecting schools to telephone carrier

²⁴ See id. at ¶ 482 ("Congress clearly intended to encourage competition among technologies, including competition between wireline and wireless technologies.").

²⁵ Id. at ¶¶ 476-482 (Congress intended that telecommunications services be made accessible within classrooms, and not just to the school building).

²⁶ Separate Statement of Commissioner Susan Ness, Recommended Decision at 3.

²⁷ Recommended Decision at ¶¶ 477, 482 ("No parties dispute that the wireless services that such schools purchase are services eligible for support.").

offices for more than 25 percent of public schools."²⁸ This is particularly important because, while a particular school or library may not be directly limited as to the quantity of services it may purchase, the Joint Board has determined that the fund for these institutions should be capped at \$2.25 billion. A flexible regulatory structure, which includes the provision of services by CMRS carriers, will ensure that these funds are spent in the most efficient manner possible.

IV. THE COMMISSION SHOULD REDUCE THE MARKET EFFECTS OF THE UNIVERSAL SERVICE SUPPORT FUNDS BY LIMITING TRANSFERS TO THOSE AMOUNTS NEEDED TO ACHIEVE THE PUBLIC POLICY GOALS.

Universal service supports are a valuable means of providing critical telecommunications services to low income consumers, consumers in high cost, rural, and insular areas, as well as to schools and libraries. Congress has determined that all interstate telecommunications carriers must contribute to the funds which support these services.²⁹ The Recommended Decision expounds upon Congress' mandate and concludes that contributions to the support programs should be based upon a telecommunications carrier's gross interstate and intrastate revenues.³⁰ As the

²⁸ Id. at ¶ 482 (citing McKinsey and Company, "Connecting K-12 Schools to the Information Superhighway" at 58 (1995)).

²⁹ 47 U.S.C. § 254(d) ("Every telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service.").

³⁰ Recommended Decision at ¶ 807 (carriers should contribute to the universal service programs based on their gross revenues, net of payments to other carriers); see also Recommended Decision at ¶ 817 ("[U]niversal service support mechanisms for schools and libraries and rural health care

Commission promulgates rules to satisfy the funding of universal service supports, it must be sure to temper the impulse to create an exceedingly large fund with the need to foster a competitive and efficient telecommunications market.

The universal service support programs are in essence a monetary transfer used to preserve the affordability of supported services. In achieving these objectives, the Commission should seek to minimize the distortionary impact the transfer may have on demand for carriers' telecommunications services. While the Recommended Decision did not specify the amount of money that would be needed to support these services, the Commission should act with the understanding that all transfers, no matter how small, will result in market distorting inefficiencies.

With the exception of wireline local loop services in most areas of the United States, telecommunications services are offered in demonstrably competitive markets, such that exogenous cost increases must, in most cases, be passed on to consumers.³¹

providers be funded by assessing both the intrastate and interstate revenues of providers of interstate telecommunications services. The Joint Board makes no recommendation concerning the appropriate funding base of the modified high cost and low income assistance programs.").

³¹ Notwithstanding Chairman Hundt's expectations, "that [telecommunications] carriers [should] pay their universal assessments from their own revenue," it seems likely that a substantial portion of this multi-billion dollar support program will be borne by subscribers. In other words, some level of the increased costs of universal service must be passed on to the subscribers of telecommunications services. "Joint Board Scores Some Success, Ducks Universal Service Reform," State Telecommunications Regulation Report, November 14, 1996, at 3.

As Commissioner Chong recognized, "[l]et us make no mistake about who will foot the bill for this universal service program . . . the users of telecommunications services to whom these costs will be passed through in a competitive marketplace."³² It is textbook economics for competitive markets that an increase in price will reduce the quantity of services demanded. Thus, universal service obligations will put upward pressure on prices and downward pressure on the quantity of telecommunications services demanded by the public. As universal service obligations increase, the market-distorting effects on price and quantity demanded will also increase. For these reasons, the federal universal service fund should be designed to realize the least amount of transfers necessary to achieve the public policy goals established by Congress and the Joint Board.

V. CONTRARY TO THE JOINT BOARD'S FINDING, SECTION 332 PREEMPTS STATE REGULATION OF CMRS PROVIDERS FOR UNIVERSAL SERVICE CONCERNS EXCEPT IN NARROWLY DEFINED CIRCUMSTANCES.

The Commission is confronted in this proceeding with a significant jurisdictional question. In the Recommended Decision, the Joint Board concluded without analysis that "[S]ection 332(c)(3) does not preclude states from requiring CMRS providers to contribute to state support mechanisms."³³ CTIA respectfully suggests that the Joint Board's finding is contrary

³² Separate Statement of Commissioner Rachelle B. Chong, Recommended Decision at 14; see also Separate Statement of Commissioner Susan Ness, Recommended Decision at 2 ("we were mindful that the funds for universal service ultimately come from consumers.").

³³ Recommended Decision at ¶ 791.

to Section 332 of the Communications Act and its underlying policy and legislative history. While CMRS carriers may be required to contribute to the federally administered universal service system, Section 332 prohibits States from compelling CMRS carriers' participation in intrastate universal service contribution mechanisms.

The Joint Board's unexplained and unsupported finding does not withstand even minimal scrutiny.³⁴ In its 1993 amendments to Section 332, Congress preempted State rate and entry regulation of CMRS³⁵ to "foster the growth and development of mobile services that, by their nature, operate without regard to State lines as an integral part of the national telecommunications infrastructure."³⁶ Most importantly for present purposes, Congress carefully proscribed the States' limited, residual authority to regulate CMRS providers for universal service concerns by stating that:

³⁴ Indeed, the Joint Board's recitation of the arguments made by CTIA with respect to State authority under Section 332 focuses on the first sentence of Section 332(c)(3) and completely ignores the second sentence of Section 332(c)(3), which, as explained below, is the gravamen of CTIA's argument.

³⁵ Specifically, Section 332(c)(3)(A) provides in relevant part: "Notwithstanding sections 152(b) and 221(b), no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service . . . except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services." 47 U.S.C. § 332(c)(3)(A).

³⁶ See H.R. Rep. No. 111, 103rd Cong., 1st Sess. 260 (1993). See also H.R. Conf. Rep. No. 213, 103rd Cong., 1st Sess. 490 (1993) (the intent of Section 332(c)(1)(A) "is to establish a Federal regulatory framework to govern the offering of all commercial mobile services") ("Conference Report").

Nothing in this subparagraph shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates.³⁷

Congress could hardly have been more clear. However, Congress further explained in the Conference Report that:

the Conferees intend that the Commission should permit States to regulate radio service provided for basic telephone service if subscribers have no alternative means of obtaining basic telephone service. If, however, several companies offer radio service as a means of providing basic telephone service in competition with each other, such that consumers can choose among alternative providers of this service, it is not the intention of the conferees that States should be permitted to regulate these competitive services simply because they employ radio as a transmission means.³⁸

Thus, Congress has specifically defined the scope of State jurisdiction over CMRS for universal service concerns. States have authority to regulate the rates charged by CMRS for basic telephone service only if the wireless carrier is the sole local exchange services provider in the relevant geographic market. Most importantly, if the relevant market is served by more than one provider of basic telephone service, or if the CMRS carrier was providing a service other than basic telephone service, State

³⁷ 47 U.S.C. § 332(c)(3)(A) (emphasis added).

³⁸ Conference Report at 493 (emphasis added).

regulation of the CMRS provider, even for universal service concerns, is not permitted.³⁹

This result is entirely consistent with Section 253(e), which preserves the application of Section 332(c)(3) to CMRS providers against the application of other subsections of Section 253.⁴⁰ Section 253(b) essentially maintains State authority to regulate for universal service concerns in accordance with Section 254 without exposure to having such regulation overturned as an entry barrier under Section 253(a) and (d).⁴¹ With this in mind, though, Section 253(e) was adopted to ensure that the States' authority under Section 254 does not hinder the application of Section 332(c)(3), which sharply circumscribes their ability to regulate CMRS providers for universal service concerns.

The conclusion is ineluctable: Section 332(c)(3), as confirmed by its legislative history, and Section 253(e) mandate that a State's attempt to administer universal service with respect to CMRS carriers is subject to the requirements of Section 332.

³⁹ The only other instance in which a State may regulate CMRS carrier rates is if it demonstrates that the current market fails to adequately protect subscribers "from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory." See 47 U.S.C. § 332(c)(3)(A)(i), (B). To date, no State has been able to successfully meet this burden to either retain current CMRS regulation or to reimpose State regulation.

⁴⁰ See 47 U.S.C. § 253(e) (providing that "[n]othing in this section shall affect the application of section 332(c)(3) to commercial mobile service providers").

⁴¹ See 47 U.S.C. § 253(a), (b), (d).

CONCLUSION

For these reasons, CTIA respectfully requests that the Commission adopt universal service provisions that are procompetitive, efficient, and consistent with Congress' intent.

Respectfully submitted,

**CELLULAR TELECOMMUNICATIONS
INDUSTRY ASSOCIATION**



Michael F. Altschul
Vice President, General Counsel

Randall S. Coleman
Vice President for
Regulatory Policy and Law

1250 Connecticut Avenue, N.W.
Suite 200
Washington, D.C. 20036
(202) 785-0081

Its Attorneys

December 19, 1996

CERTIFICATE OF SERVICE

I, Michael F. Altschul, hereby certify that a copy of the foregoing Comments of Cellular Telecommunications Industry Association has been served via U.S. first class mail this day upon the following parties:

HAND DELIVERED:

Reed E. Hundt
Chairman
Federal Communications Commission
1919 M Street, N.W.
Room 814
Washington, D.C. 20554

Commissioner Rachelle B. Chong
Federal Communications Commission
1919 M Street, N.W.
Room 844
Washington, D.C. 20554

Commissioner Susan Ness
Federal Communications Commission
1919 M Street, N.W.
Room 832
Washington, D.C. 20554

Lisa Boehley
Federal Communications Commission
2100 M Street, N.W.
Room 8605
Washington, D.C. 20554

James Casserly
Office of Commissioner Ness
Federal Communications Commission
1919 M Street, N.W.
Room 832
Washington, D.C. 20554

John Clark
Federal Communications Commission
2100 M Street, N.W.
Room 8619
Washington, D.C. 20554

Bryan Clopton
Federal Communications Commission
2100 M Street, N.W.
Room 8615
Washington, D.C. 20554

Irene Flannery
Federal Communications Commission
2100 M Street, N.W.
Room 8922
Washington, D.C. 20554

Daniel Gonzalez
Office of Commissioner Chong
Federal Communications Commission
1919 M Street, N.W.
Room 844
Washington, D.C. 20554

Emily Hoffnar
Federal Communications Commission
2100 M Street, N.W.
Room 8623
Washington, D.C. 20554

L. Charles Keller
Federal Communications Commission
2100 M Street, N.W.
Room 8918
Washington, D.C. 20554

David Krech
Federal Communications Commission
2025 M Street, N.W.
Room 7130
Washington, D.C. 20554

Diane Law
Federal Communications Commission
2100 M Street, N.W.
Room 8920
Washington, D.C. 20554

Robert Loube
Federal Communications Commission
2100 M Street, N.W.
Room 8914
Washington, D.C. 20554

Tejal Mehta
Federal Communications Commission
2100 M Street, N.W.
Room 8625
Washington, D.C. 20554

John Morabito
Deputy Division Chief
Accounting and Audits
Federal Communications Commission
2000 L Street, N.W.
Suite 812
Washington, D.C. 20554

Mark Nadel
Federal Communications Commission
2100 M Street, N.W.
Room 8916
Washington, D.C. 20554

John Nakahata
Office of the Chairman
Federal Communications Commission
1919 M Street, N.W.
Room 814
Washington, D.C. 20554

Kimberly Parker
Federal Communications Commission
2100 M Street, N.W.
Room 8609
Washington, D.C. 20554

Jeanine Poltronieri
Federal Communications Commission
2100 M Street, N.W.
Room 8924
Washington, D.C. 20554

Gary Seigel
Federal Communications Commission
2000 L Street, N.W.
Suite 812
Washington, D.C. 20036

Richard Smith
Federal Communications Commission
2100 M Street, N.W.
Room 8605
Washington, D.C. 20554

Pamela Szymczak
Federal Communications Commission
2100 M Street, N.W.
Room 8912
Washington, D.C. 20554

Lori Wright
Federal Communications Commission
2100 M Street, N.W.
Room 8603
Washington, D.C. 20554

FIRST CLASS MAIL:

The Honorable Julia Johnson
Commissioner
Florida Public Service Commission
Gerald Gunter Building
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

The Honorable Kenneth McClure
Commissioner
Missouri Public Service
Commission
301 W. High Street, Suite 530
Jefferson City, MO 65101

The Honorable Sharon L. Nelson
Chairman
Washington Utilities and
Transportation Commission
P.O. Box 47250
Olympia, WA 98504-7250

The Honorable Laska Schoenfelder
Commissioner
South Dakota Public Utilities
Commission
500 E. Capital Avenue
Pierre, SD 57501-5070

Martha S. Hogerty
Public Counsel for the
State of Missouri
P.O. Box 7800
Harry S. Truman Bldg., Rm 250
Jefferson City, MO 65102

Paul E. Pederson
State Staff Chair
Missouri Public Service
Commission
P.O. Box 360
Truman State Office Building
Jefferson City, MO 65102

Charles Bolle
South Dakota Public Utilities
Commission
State Capitol
500 E. Capitol Street
Pierre, SD 57501-5070

Deonne Bruning
Nebraska Public Service
Commission
300 The Atrium
1200 N Street, P.O. Box 94927
Lincoln, NE 68509-4927

Lori Kenyon
Alaska Public Utilities
Commission
1016 West Sixth Avenue
Suite 400
Anchorage, AK 99501

Debra M. Kriete
Pennsylvania Public Utilities
Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

Mark Long
Florida Public Service Commission
2540 Shumard Oak Blvd.
Gerald Gunter Building
Tallahassee, FL 32399-0850

Samuel Loudenslager
Arkansas Public Service
Commission
P.O. Box 400
Little Rock, AR 72203-0400

Sandra Makeeff
Iowa Utilities Board
Lucas State Office Building
Des Moines, IA 50319

Philip F. McClelland
Pennsylvania Office of
Consumer Advocate
1425 Strawberry Square
Harrisburg, PA 17120

Michael A. McRae
D.C. Office of the
People's Counsel
1133 15th Street, N.W.
Suite 500
Washington, D.C. 20005

Terry Monroe
New York Public Service
Commission
Three Empire Plaza
Albany, NY 12223

Lee Palagyi
Washington Utilities and
Transportation Commission
1300 S. Evergreen Park Dr., S.W.
Olympia, WA 98504

Barry Payne
Indiana Office of the
Consumer Counsel
100 North Senate Avenue
Room N501
Indianapolis, IN 46204-2208

James Bradford Ramsay
National Association of
Regulatory Utility
Commissioners
P.O. Box 684
Washington, D.C. 20044-0684

Brian Roberts
California Public Utilities
Commission
505 Van Ness Avenue
San Francisco, CA 94102-3298

A handwritten signature in black ink, appearing to read "Michael F. Altschul", written over a horizontal line.

Michael F. Altschul

Dated: December 19, 1996